

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar**

Thursday, November 03, 2016

Hearing Room

5B

10:00 AM

8:15-13008 Anna's Linens, Inc.

Chapter 11

Adv#: 8:15-01440 Anna's Linens, Inc. v. Boston Warehouse Trading Corp.

#1.00 STATUS CONFERENCE RE: Complaint for: (1) Avoidance and Recovery of Preferential Transfers [11 USC Sections 547(b), 550(a), and 551]; and (2) Disallowance of Any Claims Held by Defendant [11 USC Section 502(d)] (cont'd from 10-27-16)

Docket 1

***** VACATED *** REASON: CONTINUED TO 12-15-16 AT 10:00 A.M.
PER ORDER ON STIPULATION BETWEEN PLAINTIFF AND
DEFENDANT TO EXTEND DEADLINE TO RESPOND TO COMPLAINT
AND TO CONTINUE STATUS CONFERENCE ENTERED 11-01-16**

Tentative Ruling:

Tentative for 8/11/16:

Status conference continued to October 27, 2016 at 10:00 a.m. to permit documentation of settlement.

Tentative for 6/23/16:

Status conference continued to March 31, 2016 at 10:00 a.m. as requested.

Party Information

Debtor(s):

Anna's Linens, Inc.

Represented By

David B Golubchik

Lindsey L Smith

Eve H Karasik

John-Patrick M Fritz

Todd M Arnold

Ian Landsberg

Juliet Y Oh

Defendant(s):

Boston Warehouse Trading Corp.

Pro Se

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CONT... Anna's Linens, Inc.

Chapter 11

Plaintiff(s):

Anna's Linens, Inc.

Represented By
Irving M Gross

U.S. Trustee(s):

United States Trustee (SA)

Pro Se

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8:15-14629 Shahid Chaudhry

Chapter 11

Adv#: 8:15-01475 State of California Employment Development Departm v. Chaudhry

#2.00 STATUS CONFERENCE RE: Complaint for Determination Of
NonDischargeability Of Debt Pursuant To 11 USC §523
(cont'd from 10-27-16)

Docket 1

Tentative Ruling:

Tentative for 11/3/16:
Why is there still no status report?

Tentative for 9/8/16:
Without an updated status report the court cannot tell if this matter is any
closer to resolution. Should a pretrial conference be scheduled?

Tentative for 4/7/16:
Status conference continued to September 8, 2016 at 10:00 a.m.
Deadline for completing discovery: August 15, 2016
Last date for filing pre-trial motions: August 29, 2016

So, what became of discussions regarding plan treatment?

Tentative for 3/10/16:
Status conference continued to April 7, 2016 at 10:00 a.m. per request.

Party Information

Debtor(s):

Shahid Chaudhry

Represented By
Anerio V Altman

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CONT... Shahid Chaudhry

Chapter 11

Defendant(s):

Shahid Chaudhry

Pro Se

Plaintiff(s):

State of California Employment

Represented By
Hutchison B Meltzer

U.S. Trustee(s):

United States Trustee (SA)

Pro Se

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8:14-13094 Gregory Michael Daw

Chapter 7

Adv#: 8:16-01134 Marshack v. Quiett

#3.00 STATUS CONFERENCE RE: Complaint For: (1) Declaratory Relief [11 U.S.C. § 541(a)(2); FRBP 7001(1), 7001(2), 7001(9)]; (2) Quiet Title [Cal. Code Civ. Proc. §760.020]; (3) Avoidance & Recovery of Inentional Fraudulent Transfer [11 U.S.C. §§544, 548, 550; Cal Civ. Code §§3439.04, 3439.07]; (4) Avoidance & Recovery of Constructive Fraudulent Transfer [11 U.S.C. §§544, 548, 550; Cal. Civ. Code §§3439.04, 3439.05, 3439.07]; and (5) Turnover of Property [11 U.S.C. §542].
(cont'd from 8-4-16)

Docket 1

Tentative Ruling:

Tentative for 11/3/16:

Status conference continued to December 8, 2016 at 10:00 a.m. Appearance optional.

Tentative for 8/4/16:

Status conference continued to November 3, 2016 at 10:00 a.m.

Refer to mediation. Order appointing mediator to be lodged by plaintiff within 10 days. One day of mediation to be completed by October 15, 2016.

Party Information

Debtor(s):

Gregory Michael Daw

Represented By
Jerome S Demaree

Defendant(s):

Leslie Quiett

Pro Se

Plaintiff(s):

Richard A. Marshack

Represented By
D Edward Hays

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CONT... **Gregory Michael Daw**

Sarah C Boone

Chapter 7

Trustee(s):

Richard A Marshack (TR)

Represented By
David Wood
D Edward Hays

Richard A Marshack (TR)

Pro Se

U.S. Trustee(s):

United States Trustee (SA)

Pro Se

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8:16-11113 Hung N Mai

Chapter 7

Adv#: 8:16-01166 American Express Centurion Bank v. Mai

**#4.00 STATUS CONFERENCE RE: Complaint Objecting to the Dischargeability of Debt Under 11 USC Sections 523 (a)(2)(A) and (a)(2)(C)
(con't from 9-15-16 pending default judgment prove up)**

Docket 1

***** VACATED *** REASON: OFF CALENDAR - MOTION IS
GRANTED RE: DEFAULT JUDGMENT ON 10-13-16**

Tentative Ruling:

Tentative for 9/15/16:

Status conference continued to November 3, 2016 at 10:00 a.m. pending default judgment prove up.

Party Information

Debtor(s):

Hung N Mai

Pro Se

Defendant(s):

Hung N Mai

Pro Se

Plaintiff(s):

American Express Centurion Bank

Represented By
Robert S Lampl

Trustee(s):

Weneta M Kosmala (TR)

Pro Se

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8:16-11899 Robert C. Zurn

Chapter 7

Adv#: 8:16-01189 AMERICAN EXPRESS BANK, FSB v. Zurn

#5.00 STATUS CONFERENCE RE: Complaint to Determine Dischargeability of Debt

Docket 1

***** VACATED *** REASON: OFF CALENDAR - ORDER APPROVING
JOINT STIPULATION OF DISMISSAL ENTERED 9-7-16**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Robert C. Zurn

Represented By
June L Harris

Defendant(s):

Robert C. Zurn

Pro Se

Joint Debtor(s):

Joyce M. Zurn

Represented By
June L Harris

Plaintiff(s):

AMERICAN EXPRESS BANK,

Represented By
Gilbert B Weisman

Trustee(s):

Jeffrey I Golden (TR)

Pro Se

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8:14-13214 Joseph Francis Bartholomew

Chapter 7

Adv#: 8:16-01191 Dunham v. Wolfe

**#6.00 STATUS CONFERENCE RE: Complaint to Determine the Validity, Priority and
Extent of Lien.**

Docket 1

Tentative Ruling:

Tentative for 11/3/16:

Deadline for completing discovery: January 31, 2017

Last date for filing pre-trial motions: February 20, 2017

Pre-trial conference on: March 2, 2017 at 10:00 a.m.

Joint pre-trial order due per local rules.

Party Information

Debtor(s):

Joseph Francis Bartholomew

Represented By
Dana M Douglas
Edward T Weber

Defendant(s):

John M Wolfe

Pro Se

Plaintiff(s):

Richard Dunham

Represented By
Joseph M Adams

Trustee(s):

John M Wolfe (TR)

Represented By
David M Goodrich

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8:07-12994 South Coast Oil Corporation

Chapter 7

Adv#: 8:16-01192 Joseph v. Blakemore et al

#7.00 STATUS CONFERENCE RE: Chapter 7 Trustee's Complaint to Subordinate Claims Numbered 109, 110, 111, 112, 113, 114, 115 and 117 Pursuant to 11 USC Section 510(b)

Docket 1

***** VACATED *** REASON: CONTINUED TO 1-5-2017 AT 10:00 A.M.
PER ORDER GRANTING CONTINUANCE OF STATUS CONFERENCE
ENTERED 11-01-16**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

South Coast Oil Corporation

Represented By
David M Poitras
Edward O Lear
Douglas L Mahaffey

Defendant(s):

Carl Reisman	Pro Se
Dennis Goltz	Pro Se
Donald G Parsons	Pro Se
Claire Reisman	Pro Se
LARRY LINDSTROM	Pro Se
Eve Blakemore	Pro Se
Mike Blakemore	Pro Se
Theodore I BOTTER	Pro Se
Robert C Blakemore	Pro Se

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CONT... South Coast Oil Corporation

Chapter 7

Plaintiff(s):

James J Joseph

Represented By
Cathrine M Castaldi

Trustee(s):

James J Joseph (TR)

Represented By
Ronald Rus
Olman J Valverde

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8:12-23562 FusionBridge, Ltd.

Chapter 7

Adv#: 8:13-01342 Naylor (TR) v. Aarsvold et al

#8.00 PRE-TRIAL CONFERENCE Re: Issue of Damages Re: Motion for Summary Judgment or, Alternatively, Partial Summary Judgment (cont'd from 4-7-16 per order approving stip to cont. pre-trial entered 3-25-16 re: the motion for summary judgment)
[ONLY AS TO THE QUESTION OF DAMAGES]
(cont'd from 10-27-16 on court's own motion)

Docket 34

***** VACATED *** REASON: CONTINUED TO 1-26-2017 AT 10:00
A.M. PER ORDER APPROVING STIPULATION TO CONTINUE PRE-
TRIAL CONFERENCE ENTERED 11-01-16**

Tentative Ruling:

Tentative for 10/1/15:

This is a hearing on that portion of the Trustee's summary judgment motion going to the question of damages for the fraudulent transfer to defendant Fusionbridge Wyoming and for defendant Aarsvold's breach of fiduciary duty. The court has already indicated in its lengthy tentative decision published for the hearing August 6, 2015 (see Exhibit "1" to moving papers) that liability has been established. The court set this matter for further hearing and briefing because it did not believe that the amount of damages had been adequately established in the earlier motion. The court still does not believe that the amount has been established as a matter of law nor as one without material question of fact, as is required in a Rule 56 context.

The Trustee's argument boils down to the dubious assertion that all amounts shown on defendant Fusion Bridge Wyoming's 2012 tax return taken as a business deduction for expenditures to consultants or subcontractors (\$594,587 or \$516,523.90 in defendants' version) is either a fraudulent deduction or in fact represents payment (in the main) to Mr. Aarsvold. From this premise the Trustee further argues that perforce such sums must be "damages" caused by the fraudulent conveyance. There are problems with this premise even before we get to the bulk of the argument about

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excluding evidence, as addressed below. The first problem is that the court cannot accept the premise that even if most of the said sum went to Aarsvold this necessarily translates dollar for dollar as damages. Presumably, Aarsvold did *some* work allegedly to earn these payments. This is the assumption although neither side produces much addressing this issue. Presumably, the revenue enjoyed would not have been received by Fusionbridge Wyoming absent *someone* doing some work, at a cost. The Trustee's task would seem to be in establishing that there a margin or delta of some kind between the cost of producing the product and the amounts received, representing the value of the transferred assets. If the contention is that fraudulent transferors like Aarsvold don't get anything for their labors, or that they work for free, and therefore their efforts are simply added to the value of the transferred assets, that contention will have to be supported by some authority. But the court sees none.

The bulk of the Trustee's argument seems to be that the burden is on the defendants to prove the validity of deductions, and that defendant should be foreclosed from proving or even questioning any of this because some of the substantiating documentation of amounts paid other consultants than Aarsvold was not timely produced, or was not timely identified by Aarsvold in his deposition. Turning to FRCP 37(c)(1), the Trustee argues that any such evidence offered now should be stripped from the record as a sanction. But there are problems with this argument too. First, as discussed above, the court is not convinced that this is the defendants' burden or that the court can accept the Trustee's dubious premise (that the revenue can be produced or counted dollar for dollar without someone spending time as a deductible cost). But even if it were the defendants' burden, Rule 37(c)(1) is not by its terms absolute. Other alternative sanctions are enumerated in the Rule and the sanction is qualified if there is a showing that the omission was "substantially justified" or "harmless." While the court is not prepared to say that any of these omissions were justified, Mr. Negrete's prolonged and unexplained absence and the question raised in the papers whether the documents were given to him (but inexplicably not forwarded in discovery) make a strict application of the sanction unlikely, at least absent more explanation.

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In sum, the court is not convinced on this record that the amount of damages can be determined without consideration of disputed fact. Nor is the court persuaded of the Trustee's premise on damages in the first place.

Deny

Tentative for 8/6/15:

1. Introduction

This is Trustee's Motion for Summary Judgment to (1) avoid and recover fraudulent transfer, (2) for judgment that Defendant breached fiduciary duty, and (3) that Defendant is the alter ego of Debtor. The key issue in the fraudulent transfer claims is whether Defendant had the requisite intent to hinder, delay or defraud creditors. The undisputed facts indicate that he did. Prior to bankruptcy, Mr. Matthew Aarsvold ("Aarsvold") transferred substantially all of Debtor's assets to Fusionbridge Wyoming. He did this while litigation against Debtor was pending. There was no consideration given for the exchange. Although Aarsvold asserts that this transfer was intended to protect Debtor, he offers no documentary evidence or specific details to support his argument.

2. Statement of Facts

There is an extended history involving transfers of assets between Aarsvold's corporations and entities, in each case after creditors began to apply pressure. Back in 2005, Aarsvold owned Strategix, Ltd. ("Strategix") and ePassage, Inc. ("ePassage"). A lawsuit was filed in Orange County Superior Court and claims were asserted by Infocrossing West, Inc. and Infocrossing Services, Inc. (collectively, "Infocrossing") against Strategix, ePassage, and Aarsvold ("State Court Action"). See State Court Action's docket attached as Exhibit "10" to Wood Decl. Infocrossing obtained a preliminary injunction against Strategix, ePassage, and Aarsvold. *Id.* On August of 2005, Aarsvold filed paperwork to incorporate Debtor. See Wood Decl., Ex. "18."

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Debtor performed substantially the same services as Strategix and ePassage. See Wood Decl., Ex. 8, pg. 405:26-406:3. In June of 2009, a judgment was entered against Aarsvold, Strategix, and ePassage amounting to approximately \$1.3 million in damages. Wood Decl., Ex. 9 and Ex. 10, pg. 428. Mr. and Mrs. Aarsvold filed a Chapter 7 petition that same month. See copy of docket for Aarsvold Bankruptcy attached as Ex. "19" to Wood Decl.

On January 14, 2011, Aarsvold acquired Webworld, Inc., a Wyoming Corporation, and changed its name to Fusionbridge Ltd. Wood Decl., Ex. "17." In October of 2011, Aarsvold executed the APA as CEO of both Debtor and Fusionbridge Wyoming. Wood Decl., Ex. 2, pg. 49. Debtor and Fusionbridge Wyoming entered into an Asset Purchase Agreement ("APA") on October 29, 2011. Exhibit "2." Pursuant to the APA, substantially all of Debtor's assets were sold to Fusionbridge Wyoming. In exchange for these assets, Fusionbridge Wyoming agreed to pay approximately \$100,000 in Debtor's credit card debt. All of the assumed credit card debt had been personally guaranteed by Aarsvold. Why only these selected obligations were assumed is never explained in the opposition. The contracts that Fusionbridge Wyoming agreed to assume were customer contracts and the consulting agreements of Debtor's contractors that were performing the work required by the assumed customer contracts. Wood Decl., Ex. 2, pg. 40, § 1.4. Aarsvold signed the APA as "Chief Executive Officer" for both Debtor and Fusionbridge Wyoming. *Id.*, pg. 49.

On November 28, 2012 ("Petition Date"), Fusionbridge, Ltd. ("Fusionbridge California" or "Debtor") filed a Chapter 7 petition. Karen S. Naylor is the appointed Chapter 7 Trustee ("Trustee"). On January 2, 2013, Debtor filed its schedules and statement of financial affairs ("Schedules"). Pursuant to the Schedules, Debtor had assets valued at \$6.17 and liabilities totaling \$4,762,895.60 as of the Petition Date. See Wood Decl., Ex. 1, pg. 6-25. In Debtor's Statement of Financial Affairs ("SOFA"), Debtor disclosed a transfer of assets to Fusionbridge Wyoming. The SOFA states that Debtor received no value in connection with the transfer and that it had no relationship with the transferee, Fusionbridge Wyoming. *Id.*, at pg. 32. The Schedules

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were signed by Aarsvold as Debtor's "CEO." *Id.* at pg. 28 & 36.

In November of 2013, Trustee filed this adversary proceeding against Fusionbridge Wyoming and Aarsvold seeking recovery on the following claims for relief: (1) For avoidance and recovery of fraudulent transfer pursuant to 11 U.S.C. §§ 544, 548(a)(1)(A), 550, 551; Cal. Civ. Code §§ 3439, et seq., against both Fusion Wyoming and Aarsvold; (2) For avoidance and recovery of fraudulent transfer pursuant to 11 U.S.C. §§ 544, 548(a)(1)(B), 550, 551; Cal. Civ. Code §§ 3439.05, et seq., against both Fusion Wyoming and Aarsvold; (3) Breach of fiduciary duty against Aarsvold; and (4) Conversion against both Fusion Wyoming and Aarsvold. On November 1, 2013, Trustee filed the Complaint, asserting claims against Fusionbridge Wyoming and Aarsvold. Wood Decl., Ex. "3."

A similar pattern continued even after this bankruptcy was filed. On January 10, 2014, Aarsvold's wife, Ms. Laurel Aarsvold, incorporated Glomad Services, Ltd. ("Glomad Services"). Wood Decl., Ex. "16." Sometime between January 10, 2014 and August 15, 2014, Aarsvold begins "shutting down" Fusionbridge Wyoming and starts working at 77 North Baker Inc. ("North Baker"), a company owned by Mrs. Aarsvold. Wood Decl., Ex "6" and "4." Between August 15, 2014 and December 12, 2014, North Baker begins shutting down. Mr. Aarsvold begins to work at Glomad Services where he performs the same services as he performed while working for Debtor. Wood Decl., Ex. 7, pg. 317:5-22.

3. Summary Judgment Standard

Trustee moves for summary judgment on the following claims. First, Trustee seeks a judgment on a matter of law that Defendants committed a fraudulent transfer (both actual and constructive fraud) pursuant to 11 U.S.C. §§ 544, 548(a)(1)(A), (a)(1)(B), 550, 551, and Cal. Civ. Code §§ 3439, et seq. Second, Trustee seeks a judgment that Aarsvold breached his fiduciary duties to Debtor. Third, Trustee seeks summary judgment that Aarsvold is the alter ego of both Debtor and Fusionbridge Wyoming. Fourth, Trustee seeks summary judgment dismissing all of Defendants' asserted

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affirmative defenses in Defendants' Answer to Complaint.

Rule 56 of the FRCP, which applies in adversary proceedings pursuant to Rule 7056 of the FRBP, provides that a party seeking to recover upon a claim may move for summary judgment in the party's favor upon all or any part thereof. See Fed. R. Civ. P. 56. Summary judgment is appropriate on a claim when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. See *Aronsen v. Zellerback*, 662 F. 2d 584, 591, (9th Cir. 1981). In addition to declaration testimony, it is also appropriate for the court to consider previous matters of record (such as orders, pleadings and the like) by way of a request for judicial notice when considering a motion for summary judgment. See *Insurance Co. of North America v. Hilton Hotels USA, Inc., et al.*, 908 F. Supp. 809 (D. Nev. 1995).

The party seeking summary judgment bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). However once the moving party has carried its burden under Rule 56, its opponent must do more than show that there is some metaphysical doubt as to the material facts . . . the non-moving party must come forward with "specific facts showing that there is a genuine issue for trial." *Matsushita Electric Industrial Co Ltd v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In fact, if the factual context makes the nonmoving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue of material fact. *Calhoun v. Liberty Northwest Ins. Corp.*, 789 F. Supp. 1540, 1545 (W.D. Wash. 1992) (citing *Matsushita Electric*, supra, at 538). A party cannot "rest upon the mere allegations or denials of his pleading" in opposing summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

A self-serving declaration without evidence is not enough to show that there is a genuine issue of material fact. The Ninth Circuit has held that a "conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact." *F.T.C. v. Publ'g Clearing House, Inc.*, 104 F. 3d 1168, 1171 (9th Cir. 1997). A declaration which contradicts earlier deposition testimony will also fail to create an issue of material fact. See *Andreini & Co., Inc. v.*

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Lindner, 931 F. 2d 896 (9th Cir. 1991) (citing *Radobenko v. Automated Equipment Corp.*, 520 F. 2d 540 (9th Cir. 1975)).

**4. First Claim for Relief—Avoidance and Recovery of an
Intentionally Fraudulent Transfer**

Under 11 U.S.C. § 548, a trustee may avoid a debtor's fraudulent transfer of property made with the intent to hinder, delay, or defraud creditors. See 11 U.S.C. §§ 544, 548(a)(1)(A). To prevail in a 11 U.S.C. § 548(a)(1)(A) action, the trustee must show: (1) the debtor transferred an interest in property or a debt; (2) within two years before the petition filing date; and (3) with actual intent to hinder, delay, or defraud present or future creditors.

In this case, Defendants do not dispute the claim that a transfer occurred two years before the Petition Date. The key issue here centers on the third element: whether Defendants had the actual intent to hinder, delay or defraud creditors. Whether a transfer has been made with actual intent to hinder, delay or defraud a creditor is a question of fact. *United States v. Tabor Court Realty Corp.*, F. 2d 1288, 1304 (3rd Cir. 1986). Courts generally infer fraudulent intent from the circumstances surrounding the transaction. *In re Acequia, Inc.*, 34 F. 3d 800, 805-806 (9th Cir. 1994). Courts look for "badges of fraud" that indicate fraudulent intent. *Id.* at 806. The traditional "badges of fraud" include:

- (1) The transfer of an obligation to an insider or other person with a special relationship with the debtor;
- (2) The debtor retained possession or control over the property after the transfer;
- (3) The transfer was not disclosed;
- (4) Actual or threatened litigation against the debtor at the time of the

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transfer;

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- (5) The transfer included all or substantially all of the debtor's assets;
- (6) The debtor absconded;
- (7) The debtor removed or concealed assets;
- (8) The value of the consideration received by the debtor was not reasonably equivalent to the value of the asset transfer;
- (9) Insolvency or other unmanageable indebtedness on the part of the debtor;
- (10) The transfer occurred shortly after a substantial debt was incurred; and
- (11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

In re Acequia, Inc., 34 F. 3d at 806; see also Cal. Civ. Code § 3439.04(b)(1)-(11).
Fraudulent intent is inferred "when an insolvent debtor makes a transfer and gets nothing or very little in return." *Kupetz v. Wolf*, 845 F. 2d 842, 846 (9th Cir. 1988).

Here, the evidence in the record shows that at least six (6) "badges of fraud" are present. Each applicable to this case is discussed below:

(a) Actual or threatened litigation against the debtor at the time of the transfer.

The Debtor was involved in pending litigation at the time of the transfer. At the time of the APA transfer, Aarsvold and his previous companies (Strategix and ePassage) had been in litigation with Infocrossing since June of 2005. Aarsvold and his companies kept losing legal battles and per Aarsvold's own testimony, the APA was entered into because "it was unlikely that [Debtor] could get an additional line of credit for operating funds. . ." Tellingly, the Petition Date was only days after the state

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court granted Infocrossing's motion compelling Aarsvold to appear to furnish information to aid in enforcement of money judgment and Infocrossing's motion for attorney's fees. Wood Decl., Ex. 10, pg. 443. The facts are undisputed that Debtor was involved in litigation at the time of the transfer. Thus this "badge of fraud" (of litigation against the Debtor at the time of the transfer) is present here.

(b) The transfer included substantially all of Debtor's assets.

The court finds that the transferred assets pursuant to the APA were substantially all of Debtor's assets. This "badge of fraud" is present for the following reasons. First, a review of Debtor's bankruptcy documents strongly indicates that substantially all of Debtor's assets were transferred. Debtor disclosed only \$6.17 of personal property on its Schedule B. However in its Statement of Financial Affairs, Debtor admitted to receiving \$1,331,772.00 in gross income in 2010, and \$996,015.00 in gross income for 2011. The only logical explanation is that substantially all of Debtor's assets were transferred to Fusionbridge Wyoming. Defendants do not offer any documentary evidence showing that Debtor retained assets that were not transferred to Fusionbridge Wyoming.

Second, the plain language of the APA provides that there was a transfer of all or substantially all of Debtor's property. Specifically, section 1.1 of the APA provides that the Debtor was selling to Fusionbridge Wyoming all its "right, title, and interest in and to the assets of the Business.

Third, Fusionbridge Wyoming assumed all, save one, of Debtor's contracts to perform services. The only customer that Debtor did not transfer had a contract that ended before the APA sale closed on January 1, 2012. Based on the above evidence, this "badge of fraud" is present here.

(c) Debtor was rendered insolvent by the transaction.

It is uncontroverted and self-evident that Debtor was insolvent or became insolvent when the sale contemplated in the APA was concluded. Debtor no longer had assets to conduct business but retained virtually all of its liabilities. Wood Decl.,

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Ex. 1, pg. 8-25. Aarsvold himself testified that the sale was necessary because of Debtor's "debt load" and "it was unlikely that [Debtor] could get an additional line of credit for operating funds . . ." Wood Decl., Ex. 6, pg. 265:10-12. Defendants do not offer any evidence indicating Debtor was not insolvent when the APA was executed. Thus this "badge of fraud" is also present.

(d) A special relationship existed between Debtor and Fusionbridge Wyoming.

It is undisputed that Aarsvold was acting as the CEO for both Debtor and Fusionbridge Wyoming at the time the APA was negotiated and executed. Wood Decl., Ex.2, pg. 49. Aarsvold himself recalled being the only person involved in deciding to enter into the APA. Wood Decl., Ex. 6, pg. 237:2-8. The evidence is clear--there existed a special relationship between Debtor and Fusionbridge Wyoming.

(e) Debtor did not receive reasonably equivalent value.

Debtor did not receive reasonably equivalent value in the APA transfer. Although Fusionbridge Wyoming received substantially all of Debtor's assets, the only consideration it "paid" to Debtor was the assumption of certain debts that had been personally guaranteed by Aarsvold. Even then, Fusionbridge Wyoming has not paid those debts. Yet the contracts Fusionbridge Wyoming received generated significant earnings. According to its 2012 tax return, Fusionbridge Wyoming earned approximately \$771,000 during 2012. Moreover, Aarsvold admitted he did not go through a process of trying to value the assets held by Fusionbridge California before transferring those assets to Fusionbridge Wyoming.

Defendants argue that somehow valid consideration was passed as equivalent value in their Opposition. Defendants' argument fails. First, Defendants' Opposition cites case law that elaborates on the definition of "reasonably equivalent value." See Opposition, pg. 6. What is sorely lacking in Defendants' Opposition, however, is any kind of evidence or specific facts pertaining to the APA transfer that support any kind

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of legal argument that Debtor did receive a reasonably equivalent value. From the standpoint of creditors (particularly those left behind and not assumed), nothing of any consequence was received in return for transfer of all of the Debtor's assets.

(f) The transfer was concealed.

The circumstances and evidence strongly indicate the transfer was concealed. Fusionbridge Wyoming used the same corporate name as Debtor. Fusionbridge Wyoming used Debtor's mailing address, telephone number, and email addresses. Fusionbridge Wyoming used the same consultants as Debtor. Fusionbridge Wyoming even generated invoices that appeared identical to Debtor's invoices. All of these practices suggest that Aarsvold desired to keep the APA transfer secret.

Defendants do not even address this "badge of fraud" in their Opposition. They do not assert that they disclosed the transfer to anyone, nor do they offer any evidence to rebut Trustee's claims. Without any argument or evidence to the contrary, the evidence on the record strongly indicates that the APA transfer was concealed and this "badge of fraud" is present.

(g) Conclusion of First Claim.

In conclusion, the Court should grant the Trustee's motion for summary judgment as to the first claim. Defendants concede that there was a transfer within 2 years of the petition date. The only remaining element in question is whether Defendants had the requisite intent. To infer intent, courts rely on the presence of "badges of fraud." Here, the record shows that at least six badges of fraud are present. These "badges of fraud" strongly indicate that Defendants had the intent to delay, defraud or hinder creditors. Defendants do not offer any documentary evidence or specifics to rebut Trustee's claims regarding these "badges of fraud." Defendants's only evidence is Aarsvold's self-serving declaration that he was actually attempting to assist the Debtor by transferring what he claims were mostly unprofitable accounts. But this is inherently incredible; the court does not see how denuding a corporation of all of its assets and leaving it with only debt can somehow be regarded as indicative of

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benign intent. And although every transferred contract or relationship might not have been a winner, the continued income enjoyed by Fusionbridge Wyoming immediately starting from zero, belies this claim.

**5. Second Claim for Relief—Avoidance and Recovery of a
Constructively Fraudulent Transfer**

Under federal law, Trustee can avoid a "constructively" fraudulent transfer even in the absence of actual fraudulent intent. A "constructively" fraudulent transfer is one that was made in exchange for less than "reasonably equivalent value" at a time when debtor was insolvent. 11 U.S.C. § 548(a)(1)(B). To prevail on a claim for constructive fraudulent transfer under § 548(a)(1)(B), a trustee must establish (1) debtor transferred an interest in property, (2) debtor was insolvent at time of transfer or was rendered insolvent as a result of transfer, was engaged in business or was about to engage in business for which debtor's remaining property constituted unreasonably small capital, or intended to incur or believed that it would incur debts beyond its ability to pay as they matured, and (3) debtor received less than reasonably equivalent value in exchange for transfer. *In re Saba Enterprises, Inc.*, 421 B.R. 626, 645 (Bankr. S.D.N.Y. 2009); *In re Pajaro Dunes Rental Agency, Inc.*, 174 B.R. 557 (N.D. Cal. 1994).

Under California law, a transfer is constructively fraudulent: (1) as to a creditor whose claim arose before the transfer was made or the obligation was incurred; (2) if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation; and (3) the debtor was insolvent at the time or the debtor became insolvent as a result of the transfer or obligation. Cal. Civ. Code § 3439.05.

As discussed below, Trustee meets all elements of a constructively fraudulent transfer under both Federal and state law. There is no genuine issue of material fact as to this claim.

(a) The transfer contemplated in the APA was a constructively

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fraudulent transfer under Federal law.**

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Trustee establishes all the following elements for a constructively fraudulent transfer claim under Federal law:

i. Transfer of interest in property

It is uncontested that Debtor executed the APA and a transfer occurred. According to the APA, Debtor sold, assigned and delivered to Fusion Wyoming all of Debtor's ". . . equipment, furniture, fixtures, supplies and other similar property used in the Business; all material records related to the performance of the Assumed Contracts prior to the Closing Date; All Business Intellectual Property; All customer lists, price lists, advertising and promotional materials, sales and marketing materials, e-mail addresses used in the Business; [and] the goodwill and other intangible assets of the Business." Wood Decl., Ex. 2, pg. 39 & 51. Defendants concede that a transfer occurred.

ii. Debtor was insolvent

It is also uncontested that Debtor was insolvent or became insolvent when the transfer contemplated in the APA was concluded. At the time of the transaction, Debtor had over one million dollars in debt but had virtually no assets with which such obligations could be paid. See Wood Decl., Ex. 28. Defendants also do not offer any argument or evidence to show that Debtor was not insolvent at the time the APA transfer was executed.

iii. Debtor received less than reasonably equivalent value

The Debtor did not receive "reasonably equivalent value in exchange for the transfer or obligation." Aarsvold admitted that "[n]o cash was exchanged" from Fusionbridge Wyoming to Debtor. Wood Decl. Ex. 5, pg. 166, at 79:20-21. Any revenue generated from the contracts was paid to Fusionbridge Wyoming. These customer contracts provided Fusionbridge Wyoming with approximately \$771,000 in revenue in 2012. Additionally, Fusionbridge Wyoming received Debtor's accounts

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receivables, which exceeded \$2.5 million.

In return, Debtor received nothing. Debtor was supposed to receive payment of selected credit card debt, but even that did not occur.

Defendants assert that Aarsvold was transferring "risky" contracts in order to save Debtor from further liability. This assertion fails because Defendants offer no documentary evidence in support of this assertion. There is no evidence these contracts were costly or risky. A self-serving declaration that the contracts were liabilities will not suffice. It is clear from the record that Debtor received less than reasonably equivalent value (in fact, nothing) in exchange for the transfer.

(b) The transfer contemplated in the APA was a constructively fraudulent transfer under California state law.

Trustee succeeds in establishing all the following requisite elements of a constructive fraudulent transfer under California state law.

i. There was a creditor in existence at the time the transfer was made

It is undisputed that there was at least one creditor in existence at the time the transfer was made. Pursuant to Cal. Civ. Code § 3439.05, Trustee must establish that there was a creditor in existence at the time of the transfer whose claim remained unpaid on the Petition Date. Here, there are at least two creditors.

On October 28, 2013, Superior Financial Group ("Superior"), filed proof of claim 4-1 indicating that Superior loaned Debtor \$10,000 pursuant to a "loan agreement/promissory note" executed by Aarsvold in December of 2008. As of the Petition Date, the account balance was \$12,847.92. Additionally, on November 4, 2013, Global Systems Integration, Inc. ("Global,") filed proof of claim 5-1 asserting a claim for \$18,662.50 ("Global POC"). According to the Global POC, Debtor incurred the \$18,662.50 liability between 2007 and 2008. The obligations to both Superior and

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Global arose before the transfer, and still existed as of the Petition Date.

ii. Debtor did not receive reasonably equivalent value

Both state and federal law defining constructively fraudulent transfers share this element. As discussed above, Debtor did not receive reasonably equivalent value for the transfer. Despite Defendants' assertion that Aarsvold was trying to transfer liabilities to Fusionbridge Wyoming or that valid consideration was passed as equivalent value, Defendants offer no evidence in support of this argument. Rather, the evidence on the record shows that Debtor received nothing in return for giving up its assets to Fusionbridge Wyoming.

iii. Debtor was insolvent at the time of the transfer

Both state and federal law defining constructive fraudulent transfers share this element as well. As discussed above, Debtor was insolvent at the time of the APA transfer. This element is also undisputed. The record shows that Debtor had over one million in debt and virtually no assets to pay its obligations. Defendants do not argue this point and so this element is easily established.

(c) Conclusion of Second Claim.

Defendants offer no evidence to support an argument that Debtor received an equivalent value in the transfer. The other elements are uncontroverted. Thus there are no genuine issues of material facts as to any of the elements of this claim and the Court should grant summary judgment.

6. Third Claim for Relief—Breach of Fiduciary Duty

The elements of a claim for breach of fiduciary duty are "(1) the existence of a fiduciary relationship; (2) the breach of relationship; and (3) damages proximately caused by the breach." *In re Intelligent Direct Marketing*, 518 B.R. 579, 589 (E.D. Cal. 2014). While a director may be protected by the business judgment rule, an exception to the rule exists "in 'circumstances which inherently raise an inference of

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conflict of interest' and the rule 'does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest.'" *Id.*, (citing *Berg & Berg Enterprises LLC v. Boyle*, 178 Cal. App. 4th 1020, 1045 (2009)).

a. Aarsvold owed a fiduciary duty to Debtor.

There is no genuine issue of material fact as to whether Aarsvold owed a fiduciary duty to Debtor. The Supreme Court has held that a director is a fiduciary, and so is a dominant or controlling stockholder or group of stockholders. *Pepper v. Litton*, 308 U.S. 295, 306 (1939). In the instant case, it is uncontested that Aarsvold was not only the CEO of Debtor, but that he was also the sole shareholder of Debtor. Mr. Aarsvold admitted these material facts himself. Wood Decl., Ex. 13, Request for Admissions, No. 2-3, 5. Therefore there is no genuine issue of material fact under the first element that establishes Mr. Aarsvold owed a fiduciary duty to Debtor.

b. Aarsvold breached his fiduciary duty to Debtor.

Aarsvold breached his fiduciary duty to Debtor, and that the business judgment rule does not protect the actions taken by Aarsvold. A director breaches their fiduciary duty when approving and carrying out transactions "in 'circumstances which inherently raise an inference of conflict of interest' and the business judgment rule 'does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest.'" *In re Intelligent Direct Mktg.*, *supra*, at 589.

Aarsvold breached his fiduciary duty by carrying out transactions in circumstances which were such as to inherently raise a conflict of interest. A "conflict of interest" is a "real or seeming incompatibility between one's private interests and one's public or fiduciary duties." *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 112 (2008) (quoting Black's Law Dictionary 319 (8th ed. 2004)). The Trustee alleges that the circumstances surrounding Aarsvold, the CEO of the Debtor and Fusionbridge Wyoming, gave rise to the inference of a conflict of interest for a few reasons. First, a conflict of interest is inherent in Aarsvold's transfer of substantially all of the

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Debtor's assets to Fusionbridge Wyoming without reasonably equivalent value. Wood Decl., Ex. 2, Pg. 70, 81; Ex. 6, Pg. 252:6-14. Second, a conflict of interest is present when the debt transferred from the Debtor to Fusionbridge Wyoming only consisted of debt that Aarsvold had personally guaranteed. *Id.*, Ex. 2, Pg. 83. In his Opposition, Aarsvold fails to allege facts or provide any evidence that there was no "conflict of interest" so as to create a genuine issue of material fact.

The business judgment rule does not protect Aarsvold. The business judgement rule "does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest." *In re Intelligent Direct Mktg*, supra, at 589. By Aarsvold's own admissions, he failed to value the assets of Debtor before transfer. There was no "reasonable inquiry" that Aarsvold took in preparation for the APA transfer.

Alternatively, the Trustee makes the argument that the business judgement rule does not apply. Aarsvold's actions were taken with improper motives. The Trustee alleges that Aarsvold made the transfer in order to shield Debtor's assets from Infocrossing. Wood Decl., Ex. 2; Wood Decl., Ex. 6, Pg. 211-213. Infocrossing appeared ready to execute a judgment against Debtor when Aarsvold initiated the transfer of Debtor's assets to Fusionbridge Wyoming. Aarsvold does not deny such allegations made by the Trustee.

Aarsvold argues that he executed the transfer of assets from Debtor in order to prevent its contracts from becoming worthless and to prevent Debtor from "slipping into a position of bankruptcy." See Opposition, Pg. 8. Once again, Aarsvold fails to provide evidence. A party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda. *Hardwick v. Complete Skycap Services, Inc.*, 247 Fed. Appx. 42, 43-44 (9th Cir. 2007) (unpublished). Thus Aarsvold has failed to create a genuine issue of material fact about his true intentions as he has not presented evidence in support of his alleged intentions.

c. Mr. Aarsvold's breach of fiduciary duty damaged Debtor.

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Aarsvold's breach of fiduciary duty was the proximate cause of Debtor's damages. Whether proximate cause exists as a result of Defendants' breach of a duty are questions of fact generally resolved by a trier of fact. *Quechan Indian Tribe v. U.S.*, 535 F. Supp. 2d 1072, 1120 (S.D. Cal. 2008) (citing *Armstrong v. United States*, 756 F.2d 1407, 1409 (9th Cir.1985)). But when the facts are undisputed, and only one conclusion can be reasonably drawn, the question of causation is one of law. *Quechan Indian Tribe v. U.S.*, 535 F. Supp. 2d at 1120 (citing *Lutz v. United States*, 685 F.2d 1178, 1185 (9th Cir.1982)).

The Trustee alleges that Debtor sustained monetary damages after Aarsvold made the transfer of Debtor's assets. The Trustee presents evidence that prior to Aarsvold transferring Debtor's assets, in the years 2010 and 2011, the Debtor admitted to receiving \$1,331,772.00 and \$996,015.00 in gross income respectively. Wood Decl., Ex. 1, Pg. 59. But after Aarsvold executed the transfer in 2012, Debtor only totaled a gross income of \$15,681.39. *Id.* In contrast, Fusionbridge Wyoming had a gross income of approximately \$771,000.00 in 2012. Wood Decl., Ex. 14; Wood Decl., Ex. 25.

The only defense Defendants offer in their Opposition is that Aarsvold's decision to execute the APA was a "valid business judgment." See Opp., pg. 8:20. Aarsvold transferred contracts that "required the use and deployment of specific contractors with specific skills." *Id.*, pg. 8:20-22. Defendants argue that "if these contractors left, they would be worthless, as is the nature of the business."

This argument fails for the following reasons. First, Defendants attach no documentary evidence showing the specifics of the contracts and how by transferring them, they were protecting the Debtor. Second, is it unclear why it matters that the transferred contracts required specific contractors. Did the contractors in fact leave? On the contrary, it appears the contractors continued working for Fusionbridge Wyoming after the APA transfer was executed.

In conclusion, the Trustee has satisfied all three elements for a claim of a breach of fiduciary duty by Aarsvold. There has been no genuine issue of material fact

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established for the three elements of (1) the existence of a fiduciary relationship; (2) the breach of relationship; and (3) damages proximately caused by the breach.

7. Alter Ego Claim

Trustee seeks an order determining that Aarsvold, Debtor, and Fusionbridge Wyoming are alter egos of each other. Under California law, alter ego is present when "(1) there is such a unity of interest and ownership between the corporation and the individual or organization controlling it that their separate personalities no longer exist; and (2) failure to disregard the corporate entity would sanction a fraud or promote an injustice. *In re Intelligent Direct Marketing*, supra, at 588 (citing *Community Party v. 522 Valencia, Inc.*, 35 Cal. App. 4th 980, 993 (1995)). To determine whether alter ego is present, courts consider numerous factors including commingling of funds and other assets, unauthorized diversion of corporate funds to other than corporate uses, the treatment by an individual of the assets of the corporation as his own, among others. Twenty-eight of these factors that indicate "alter ego" are listed in *Associated Vendors v. Oakland Meat Co.*, 210 Cal. App. 2d 838-840 (1962).

Here, many of the *Associated Vendors* factors are present.

First, Aarsvold uses multiple corporate entities for a single venture. When Aarsvold's previous companies (ePassage and Strategix) encountered legal problems, Aarsvold transferred their assets to Debtor. When Debtor was facing a judgment, Aarsvold transferred its assets to Fusionbridge Wyoming. Now that Trustee has asserted claims, Aarsvold ceased operating Fusionbridge Wyoming to work for "Glomad Services." Glomad Services was incorporated by Mrs. Aarsvold and Glomad lists the same principal office and mailing address as Fusionbridge Wyoming. Wood Decl., Ex. 16.

Further, a review of Aarsvold's company's financial statements provide evidentiary support for this factor. Aarsvold testifies that North Baker is owned by his wife and provided both Debtor and Fusionbridge Wyoming with IT and administrative

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work. The following list of exchanges from Trustee's review of financial statements provided by North Baker reveals the interconnectivity of Mr. and Mrs. Aarsvold's multiple corporate entities, to wit:

- As of December 31, 2011, ePassage owed Debtor \$2,031,089.11 for legal fees that Debtor paid on behalf of ePassage and Strategix in connection with Infocrossing litigation.
- The receivable owed to Debtor by ePassage (in the amount of over two million dollars) was transferred to Fusionbridge Wyoming.
- As of December 31, 2011, North Baker owed Debtor \$496,201.79.
- The receivable owed to Debtor by North Baker was transferred to Fusionbridge Wyoming. As of December 31, 2012, North Baker owed Fusionbridge Wyoming \$489,562.41.

Second, Aarsvold diverted corporate assets. North Baker's financial statements show that Mr. Aarsvold diverted Debtor's assets to pay the obligations of his other entities. A review of North Baker's 2012 "Balance Sheet" indicates that North Baker had outstanding loan and note receivables from Aarsvold, Aarsvold's son—Andy Aarsvold, and accounts receivable owed from ePassage and Strategix. Wood Decl., 21, pg. 593. Moreover, North Baker lists as liabilities certain credit card obligations of Andy Aarsvold, Andy Asarsvold's student loans, and outstanding obligations owed to Debtor and/or Fusionbridge Wyoming.

Third, there is no dispute that Aarsvold owns and dominates Debtor and Fusionbridge Wyoming. By his own admission, Aarsvold owned and controlled ePassage, Strategix, Debtor, and Fusionbridge Wyoming. Wood Decl., Ex. 5, pg. 147, at 8:7-9; Ex. 6, pg. 203:2-4, pg. 222:10-11. Aarsvold executed the APA on behalf of Debtor and Fusionbridge Wyoming while serving as the CEO of both companies. Id.

Fourth, Mr. Aarsvold, Debtor and Fusionbridge Wyoming use the same address. See Wood Decl., Ex. 1; Ex. 6, pg. 183:14-15; 187:1-4; 227:6-16.

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Additionally, Debtor and Fusionbridge Wyoming shared the same telephone numbers and email.

Fifth, Debtor and Fusionbridge Wyoming use the same employees and consultants. Mr. and Mrs. Aarsvold are employees/owners of Debtor, Fusionbridge Wyoming, and North Baker. The APA also indicates that Fusionbridge Wyoming and Debtor used the same consultants. Wood Decl., Ex. "2," pg. 82.

Sixth, Aarsvold, Debtor and Fusionbridge Wyoming do not deal at arm's length with each other. For example, Debtor paid the legal fees and other obligations of ePassage and Strategix. Wood Decl., Ex. 7, pg. 281:22-282:13. Then, pursuant to the APA, Aarsvold assigned the ePassage receivable held by Debtor to Fusionbridge Wyoming. Debtor had also loaned money to North Baker (Mrs. Aarsvold's company). Pursuant to the APA, that receivable was assigned to Fusionbridge Wyoming. These actions strongly indicate that Aarsvold improperly uses the corporate entity as a shield against personal and corporate liability.

Seventh, Aarsvold intentionally had Fusionbridge Wyoming operate as if it were Debtor. Fusionbridge Wyoming and Debtor shared the same mailing address and telephone number. Their logos are the same and their invoices also appear identical. Wood Decl., Ex. 22 & 23. Mr. Aarsvold's electronic signature on email is also identical from Debtor and Fusionbridge Wyoming. These actions strongly indicate Aarsvold's intent to present one single entity to customers.

In sum, multiple *Associated Vendors* factors are present to indicate that Aarsvold, Debtor, and Fusionbridge Wyoming are the alter egos of each other. Defendants do not even attempt to argue against this claim in their Opposition. Because of the undisputed evidence in the record, the Court determines that Aarsvold, Debtor, and Fusionbridge Wyoming are the alter egos of each other.

8. Affirmative Defenses

Trustee seeks summary judgment on each of Defendants' affirmative defenses. In their Answer to the Complaint, Defendants assert the following seventeen (17)

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affirmative defenses:

- (1) Trustee fails to state a claim for relief;
- (2) The Complaint fails to establish the elements necessary to establish the purported claims for relief;
- (3) Plaintiff seeks relief not available to her;
- (4) Complaint has been filed in bad faith;
- (5) Plaintiff failed to mitigate damages;
- (6) Plaintiff is barred from recovering damages because of unclean hands;
- (7) Plaintiff is stopped from recovery damages;
- (8) Plaintiff has waived any right to recover damages;
- (9) Plaintiff waited an unreasonable period of time to complain of the alleged wrongdoing;
- (10) Damages alleged in the Complaint were caused by other unnamed Defendants;
- (11) Allegations in the Complaint is barred by statutes of limitation;
- (12) Allegations in the Complaint are barred because the Defendants' actions were justified;
- (13) Plaintiff has not set forth a sufficient factual or legal basis for the recovery of attorneys' fees from Defendants;
- (14) Any award in Plaintiff's favor would constitute unjust enrichment;
- (15) Allegations in Complaint are barred because Plaintiff has not suffered

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injury or damages alleged;

(16) Defendants have substantially complied with all requirements of law;
and

(17) Plaintiff lacks standing to sue.

There is simply no legal or factual support for any of the above affirmative defenses. In light of the extensive discovery conducted, Defendants still cannot apparently offer facts or legal theories to support any of these affirmative defenses, and these are Defendants' burden to prove. Thus, there is no genuine issue of material fact as to any of these affirmative defenses and the Court should grant summary judgment dismissing these defenses.

9. Conclusion

Defendants have not offered any meaningful evidence to indicate a genuine issue of material fact as to any of Trustee's claims. Trustee's evidence in contrast is clear and persuasive. There does not appear to be any genuine issue of law. It would appear that this is a proper case for judgment by motion.

Party Information

Debtor(s):

FusionBridge, Ltd.

Represented By
Carlos F Negrete

Defendant(s):

Fusion Bridge, Ltd.

Represented By
Carlos F Negrete

Matthew David Aarsvold

Represented By
Carlos F Negrete

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Mediator(s):

Thomas H. Casey

Represented By
Thomas H Casey

Plaintiff(s):

Karen S. Naylor (TR)

Represented By
D Edward Hays
David Wood
Matthew Grimshaw

Trustee(s):

Karen S Naylor (TR)

Pro Se

Karen S Naylor (TR)

Represented By
D Edward Hays
Karen S Naylor (TR)

U.S. Trustee(s):

United States Trustee (SA)

Pro Se

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8:15-11185 Myung Jong Kim

Chapter 7

Adv#: 8:15-01275 Kim et al v. Kim

#9.00 PRE-TRIAL CONFERENCE RE: Complaint to determine nondischargeability of debt.
(cont'd from 7-28-16)

Docket 1

Tentative Ruling:

Tentative for 11/3/16:

Why no pre-trial stipulation? This has already been continued before.

Tentative for 9/3/15:

Deadline for completing discovery: February 29, 2016

Last date for filing pre-trial motions: March 21, 2016

Pre-trial conference on: April 7, 2016 at 10:00 a.m.

Joint pre-trial order due per local rules.

Party Information

Debtor(s):

Myung Jong Kim

Represented By
Jaenam J Coe

Defendant(s):

Myung Jong Kim

Pro Se

Plaintiff(s):

Southern California University,

Represented By
Joseph P Buchman

Young Hwan Cho

Represented By
Joseph P Buchman

Brian H. Kim

Represented By
Joseph P Buchman

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Trustee(s):

Jeffrey I Golden (TR)

Pro Se

Jeffrey I Golden (TR)

Pro Se

U.S. Trustee(s):

United States Trustee (SA)

Pro Se

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8:15-13008 Anna's Linens, Inc.

Chapter 11

Adv#: 8:15-01293 Martz-Gomez v. Anna's Linens, Inc.

#10.00 PRE-TRIAL CONFERENCE RE: Class Action Adversary Proceeding Complaint
[Violation of Worker Adjustment and Retraining Notification Act, 29 U.S.C.
Section 2101 - 2109 and California Labor Code Section 1400 ET SEQ.]
(set from status conference held on 10-8-15) (cont'd from 7-7-16)

Docket 6

***** VACATED *** REASON: CONTINUED TO FEBRUARY 23, 2016
AT 10:00 A.M. PER ORDER APPROVING STIPULATION TO MODIFY
SCHEDULING ORDER ENTERED 8/2/16**

Tentative Ruling:

Tentative for 10/8/15:
Deadline for completing discovery: June 1, 2016
Last date for filing pre-trial motions: June 20, 2016
Pre-trial conference on: July 7, 2016 at 10:00 a.m.
Joint pre-trial order due per local rules.

Party Information

Debtor(s):

Anna's Linens, Inc.

Represented By
David B Golubchik
Lindsey L Smith
Eve H Karasik
John-Patrick M Fritz
Todd M Arnold
Ian Landsberg
Juliet Y Oh

Defendant(s):

Anna's Linens, Inc.

Pro Se

Plaintiff(s):

Linda Martz-Gomez

Represented By
Gail L Chung

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Jack A Raisner
Rene S Roupinian

U.S. Trustee(s):

United States Trustee (SA)

Represented By
Michael J Hauser

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Hearing Room

5B

11:00 AM

8:10-17383 Desiree C Sayre

Chapter 7

Adv#: 8:15-01474 Chavez v. California Attorney Lending, LLC et al

#11.00 Motion To Quash Subpoena Duces Tecum Served Upon Non-Party Witness
Bank Of America

Docket 54

Tentative Ruling:

Fernando F. Chavez ("Plaintiff") brings this motion to quash the subpoena served on non-party witness Bank of America by Defendant California Attorney Lending, LLC ("CAL"). Bank of America is asked to produce any and all bank statements concerning all client trust accounts maintained by Plaintiff covering the period that includes July 1, 2014 through the present. Additionally requested for the time period of July 1, 2014 through August 31, 2014, are all deposit slips; records of deposit; records of withdrawals; records of all counter credits; copies of all cancelled checks written against said account; copies of all non-check and electronic withdrawals, including the images of customer withdrawals; copies of all wire transfers sent of received by Plaintiff; and cashier's checks in which the purchaser was Plaintiff.

Pursuant to a bankruptcy court order in the proceeding of Sayre & Levitt, LLP ("S&L"), case number 8:11-bk-15241-TA, the claim of CAL and Trustee Kosmala (the "Defendants") was allowed in the sum of \$2,100,000.00 (the "CAL/Kosmala Claim") and secured by a first priority lien against attorney's fees earned by S&L and paid after July 16, 2011. After July 2011, Plaintiff, in a LA Superior Court case (the "Chaj Case") associated with Federico C. Sayre and S&L as co-counsel. The co-counsel agreement provided that Plaintiff and Sayre/S&L would each receive 50% of attorneys' fees due from the Chaj Case.

After a jury verdict in 2013 and subsequent declaratory relief action commenced by the insurance company in the Chaj Case, a combined settlement was

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reached. \$5,000,000.00 was paid for attorneys' fees. Plaintiff paid a \$1,100,000.00 referral fee; and the balance of \$3,900,000.00 in attorneys' fees was split among four law firms. 65 percent was to be split equally between Plaintiff and Sayre/S&L. 65 percent of \$3,900,000.00 is \$2,535,000.000. Per the co-counsel agreement, 50 percent of \$2,535,000.000 is \$1,267,500.00. This is the Sayre/S&L share of attorneys' fees subject to the CAL/Kosmala Claim.

Pursuant to a state court order in the Chaj Case in late July, 2014, \$1,155,500.00 of the \$1,267,500.00 in attorneys' fees was tendered to CAL's counsel payable to Trustee Kosmala. The fees tendered to Trustee Kosmala were drawn on Plaintiff's client trust account maintained at Bank of America (the "Subject Trust Account"). The state court further ordered Plaintiff to retain in trust the sum of \$112,000.000 of the funds represented by the insurance checks in the subject trust account pending either an agreement to the Trustee, CAL and Plaintiff, or an order of a court of competent jurisdiction.

At its core, this dispute is simple. CAL and Trustee Kosmala seek evidence confirming the \$112,000.00 was deposited and retained in the Subject Trust Account. Plaintiff argues the documents requested regarding the Subject Trust Account are protected by attorney-client privilege. Plaintiff argues that because the unnamed beneficiaries of Plaintiff and his law practice alone hold the attorney-client privilege, those unnamed beneficiaries are the only persons or entities that can waive the attorney-client privilege and the privacy right therein. Plaintiff argues production of such documents will allegedly cause the Plaintiff's clients and unnamed beneficiaries to suffer irreparable harm (yet no particularization or evidence is offered in support). Moreover, Plaintiff argues the subpoenas were served solely for the purpose of harassment and that such demand is objectionable in that it is not reasonably calculated to lead to discoverable evidence.

In response CAL argues they have an actual interest in the Subject Trust Account and therefore the right to obtain discovery concerning the documents identified in the subpoena. CAL has an interest in all attorneys' fees earned by S&L after July 16, 2011, including the \$112,000.00 ordered to be deposited and held in the

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Subject Trust Account. Reportedly, Plaintiff rejected an informal request for documents concerning the account and also objected to written discovery requests concerning the account. CAL argues it has no other means of confirming whether Plaintiff complied with the state court order. Concern is reportedly exacerbated by the fact the CA State Bar filed disciplinary charges against Plaintiff alleging major misappropriation of client funds. See, *In the Matter of Fernando Fabela Chavez*, State Bar Court of California case no. 13-O-12150-LMA. Accordingly, CAL argues they have established a compelling need to see the bank statements for the Subject Trust Account as well as what funds went into and out of that account during the narrow window of time when settlement funds from the Chaj Case should have been deposited.

In his reply Plaintiff now suggests that the \$112,000 has been moved to a segregated account and that "new account documents will be presented at the hearing..." This eminently reasonable step should have been taken months ago, and much ink, time and money might have been saved. Unfortunately, it seems the norm nowadays that litigants refuse to act reasonably until much time and effort (and money) is spent.

Plaintiff argues "a party or attorney responsible for issuing and serving subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." F.R.Civ.P 45(d)(1). The subpoena should be quashed when it subjects a person to undue burden. F.R.Civ.P 45(d)(3)(iv). To determine what point burden becomes "undue," the court may consider: (1) whether the subpoena was issued primarily for purposes of harassment; and (2) whether there are other viable means to obtain the same evidence, the extent to which information sought is relevant, non-privileged, and crucial to the moving party's case. *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 729-30 (8th Cir. 2002); *Gould, Inc. v. Mitsui Mining & Smelting Co., Ltd.*, 825 F.2d 676, 680 n. 2 (2d Cir. 1987). Plaintiff's motion does not particularize how or why the subpoena was designed only to harass nor does it clarify how or why his clients and unnamed beneficiaries will suffer irreparable harm. Moreover, Plaintiff reportedly rejected both of CAL's informal and written discovery

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requests for documents concerning the account. CAL had no other means of confirming whether Plaintiff complied with the state court order (this might not have been the case had the steps now offered in the Reply been undertaken). CAL has established they have an actual interest and need to see the bank statements for the Subject Trust Account to confirm Plaintiff's compliance. Accordingly, Plaintiff's argument is unpersuasive.

The parties also argue over the import of *Hooser v. Super. Ct.*, 101 Cal. Rptr. 2d 341 (Cal. App. 4th Dist. 2000). Plaintiff maintains the *Hooser* court held that client trust accounts are not discoverable and information about clients is protected by a right of privacy. CAL in contrast asserts the court held that trust account bank statements could be produced and that the identity of an attorney's client is not considered within the protection of attorney-client privilege. But this disagreement is largely inapposite. It is settled law that bank records (including checks, cancelled checks, debit memos and bank statements) that pertain to an attorney's client trust accounts are not protected by the attorney-client privilege. *Harris v. United States*, 413 F.2d 316, 320 (9th Cir. 1969). In *Harris*, the court refused to extend the privilege to a client trust account, finding:

"The reasons which led to the attorney-client privilege, such as the aim of encouraging full disclosure in order to enable proper representation, do not exist in the case of a bank and its depositor. Moreover, the client, by writing the check which the attorney will later cash or deposit at the bank, has set the check afloat on a sea of strangers. The client knows when delivering the check, and the attorney knows when cashing or depositing it, that the check will be viewed by various employees at the bank where it is cashed or deposited, at the clearing house through which it must pass, and at his own bank to which it will eventually return. Thus, the check is not a confidential communication, as is the consultation between attorney and client." *Harris*, 413 F.2d at 319-20. See also, *Grewal & Assoc., P.C. v. Harford Cas. Ins. Co.*, 2010 WL 3909491 (W.D. Mich. 2010) (holding that case law establishes that bank records are not protected by the attorney-client privilege, and that the professional rules are

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not violated because the attorney is not revealing a confidence or secret of his or her clients).

Plaintiff makes a request for sanctions in his motion. This request will also be denied, not only because Plaintiff's underlying motion is not well taken, but also because Plaintiff's attorney has not brought a separate motion as suggested under Fed. R. Civ. P. 37(a)(5), nor have the parties (insofar as the court can determine) made any attempt to comply with LBR 7026-1(c).

Deny

Party Information

Debtor(s):

Desiree C Sayre

Represented By
Andrew Goodman
Rudolph E Brandes

Defendant(s):

WENETA M KOSMALA

Represented By
Reem J Bello
Michael R Adele

California Attorney Lending, LLC

Represented By
Richard W Labowe

Plaintiff(s):

Fernando F Chavez

Represented By
Anthony J Palik
Gregory B Henry

Trustee(s):

Weneta M Kosmala (TR)

Represented By
Reem J Bello
Jeffrey I Golden

**United States Bankruptcy Court
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8:15-13008 Anna's Linens, Inc.

Chapter 11

Adv#: 8:15-01482 P & A Marketing, Inc. et al v. Gladstone et al

#12.00 Defendants Salus Capital Partners, LLC, Salus CLO 2012-1, LTD, DCP Linens Lender, LLC and Downtown Capital Partners, LLC's Joint Motion to Dismiss First Amended Complaint
(cont'd from 8-25-16 per order approving stip. entered 7-27-16)

Docket 29

***** VACATED *** REASON: OFF CALENDAR - NOTICE OF
WITHDRAWAL OF MOTION TO DISMISS FILED 11-01-16**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Anna's Linens, Inc.

Represented By
David B Golubchik
Lindsey L Smith
Eve H Karasik
John-Patrick M Fritz
Todd M Arnold
Ian Landsberg
Juliet Y Oh
Jeffrey S Kwong

Defendant(s):

Downtown Capital Partners, LLC

Represented By
Howard Steinberg

DCP Linens Lenders, LLC

Represented By
Howard Steinberg

LTD

Pro Se

Fidelity & Guaranty Life Insurance

Represented By
Jeffrey A Davis

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CONT... Anna's Linens, Inc.

Chapter 11

Salus CLO 2012-1, Ltd.

Represented By
Howard Steinberg

Anna's Linens, Inc.

Represented By
David B Golubchik

Does 1-25

Pro Se

Salus Capital Partners, LLC

Represented By
Howard Steinberg

Loren Pannier

Pro Se

Scott Gladstone

Pro Se

Alan Gladstone

Pro Se

Kevin Reilly

Pro Se

Janet Grove

Pro Se

J.E. Rick Bunka

Pro Se

Shepherd Pryor

Pro Se

Other Professional(s):

KOGAN LAW FIRM

Represented By
Michael S Kogan

Plaintiff(s):

Shewak Lajwanti Home Fashions,

Represented By
Steven T Gubner
Michael W Davis

Welcome Industrial Corporation

Represented By
Steven T Gubner
Michael W Davis

P & A Marketing, Inc.

Represented By
Steven T Gubner
Michael W Davis

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CONT... **Anna's Linens, Inc.**
Panda Home Fashions LLC

Chapter 11

Represented By
Steven T Gubner
Michael W Davis

U.S. Trustee(s):

United States Trustee (SA)

Pro Se

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8:15-13008 Anna's Linens, Inc.

Chapter 11

Adv#: 8:15-01482 P & A Marketing, Inc. et al v. Gladstone et al

#13.00 Motion of Defendant Fidelity & Guaranty Life Insurance Company to Dismiss
First Amended Complaint
((cont'd from 8-25-16 per order approving stip. entered 7-27-16))

Docket 31

***** VACATED *** REASON: OFF CALENDAR - NOTICE OF
WITHDRAWAL OF MOTION TO DISMISS THE FIRST AMENDED
COMPLAINT FILED 11-01-16**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Anna's Linens, Inc.

Represented By
David B Golubchik
Lindsey L Smith
Eve H Karasik
John-Patrick M Fritz
Todd M Arnold
Ian Landsberg
Juliet Y Oh
Jeffrey S Kwong

Defendant(s):

Downtown Capital Partners, LLC

Represented By
Howard Steinberg

DCP Linens Lenders, LLC

Represented By
Howard Steinberg

LTD

Pro Se

Fidelity & Guaranty Life Insurance

Represented By
Jeffrey A Davis

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CONT... Anna's Linens, Inc.

Chapter 11

Salus CLO 2012-1, Ltd.

Represented By
Howard Steinberg

Anna's Linens, Inc.

Represented By
David B Golubchik

Does 1-25

Pro Se

Salus Capital Partners, LLC

Represented By
Howard Steinberg

Loren Pannier

Pro Se

Scott Gladstone

Pro Se

Alan Gladstone

Pro Se

Kevin Reilly

Pro Se

Janet Grove

Pro Se

J.E. Rick Bunka

Pro Se

Shepherd Pryor

Pro Se

Other Professional(s):

KOGAN LAW FIRM

Represented By
Michael S Kogan

Plaintiff(s):

Shewak Lajwanti Home Fashions,

Represented By
Steven T Gubner
Michael W Davis

Welcome Industrial Corporation

Represented By
Steven T Gubner
Michael W Davis

P & A Marketing, Inc.

Represented By
Steven T Gubner
Michael W Davis

Panda Home Fashions LLC

Represented By

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CONT... Anna's Linens, Inc.

Chapter 11

Steven T Gubner
Michael W Davis

U.S. Trustee(s):

United States Trustee (SA)

Pro Se

**United States Bankruptcy Court
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8:15-13008 Anna's Linens, Inc.

Chapter 7

Adv#: 8:15-01482 P & A Marketing, Inc. et al v. Gladstone et al

#14.00 Defendant's Alan Gladstone's, Scott Gladstone's, Loren Pannier's, Kevin Reilly's, Shepherd Pryor's, J.E. Rick Bunka's and Janet Grove's Motion to Dismiss First Amended Complaint.
(cont'd from 8-25-16 per order approving stip. entered 7-27-16)

Docket 55

***** VACATED *** REASON: OFF CALENDAR - NOTICE OF
WITHDRAWAL OF MOTION TO DISMISS THE FIRST AMENDED
COMPLAINT FILED 11/01/16**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Anna's Linens, Inc.

Represented By
David B Golubchik
Lindsey L Smith
Eve H Karasik
John-Patrick M Fritz
Todd M Arnold
Ian Landsberg
Juliet Y Oh
Jeffrey S Kwong

Defendant(s):

Downtown Capital Partners, LLC

Represented By
Howard Steinberg

Fidelity & Guaranty Life Insurance

Represented By
Jeffrey A Davis

LTD

Pro Se

DCP Linens Lenders, LLC

Represented By
Howard Steinberg

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CONT... Anna's Linens, Inc.

Chapter 7

Salus CLO 2012-1, Ltd.

Represented By
Howard Steinberg

Alan Gladstone, Scott Gladstone,

Represented By
Cynthia M Cohen

Does 1-25

Pro Se

Anna's Linens, Inc.

Represented By
David B Golubchik

Loren Pannier

Pro Se

Kevin Reilly

Pro Se

Alan Gladstone

Pro Se

Scott Gladstone

Pro Se

Janet Grove

Pro Se

Salus Capital Partners, LLC

Represented By
Howard Steinberg

Shepherd Pryor

Pro Se

J.E. Rick Bunka

Pro Se

Interested Party(s):

Cynthia Cohen

Represented By
Cynthia M Cohen

Other Professional(s):

KOGAN LAW FIRM

Represented By
Michael S Kogan

Plaintiff(s):

Shewak Lajwanti Home Fashions,

Represented By
Steven T Gubner
Michael W Davis
Jason B Komorsky

**United States Bankruptcy Court
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CONT... Anna's Linens, Inc.

Chapter 7

Welcome Industrial Corporation

Represented By
Steven T Gubner
Michael W Davis
Jason B Komorsky

P & A Marketing, Inc.

Represented By
Steven T Gubner
Michael W Davis
Jason B Komorsky

Panda Home Fashions LLC

Represented By
Steven T Gubner
Michael W Davis
Jason B Komorsky

Trustee(s):

Karen S Naylor (TR)

Represented By
Nanette D Sanders
Brian R Nelson

U.S. Trustee(s):

United States Trustee (SA)

Pro Se

**United States Bankruptcy Court
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11:00 AM

8:15-14828 John Trung Ngoc Nguyen

Chapter 7

Adv#: 8:16-01001 Western Heritage Insurance Company v. Nguyen

#15.00 Motion to Extend Time for Discovery Cut Off Dates, Pre Trial Conference

Docket 13

***** VACATED *** REASON: OFF CALENDAR PER ORDER
APPROVING STIPULATION TO EXTEND DISCOVERY DEADLINES
AND PRE-TRIAL ENTERED 10/7/2016**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

John Trung Ngoc Nguyen

Represented By
Nguyen H Nhuan

Defendant(s):

John Trung Ngoc Nguyen

Represented By
Nguyen H Nhuan

Plaintiff(s):

Western Heritage Insurance

Represented By
David S Hagen

Trustee(s):

Richard A Marshack (TR)

Pro Se

**United States Bankruptcy Court
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8:15-13008 Anna's Linens, Inc.

Chapter 11

Adv#: 8:15-01439 Anna's Linens, Inc. v. BALTIC LINEN COMPANY, INC.

#16.00 STATUS CONFERENCE RE: Complaint for: (1) Avoidance and Recovery of Preferential Transfers [11 USC Sections 547(b), 550(a), and 551]; and (2) Disallowance of Any Claims Held by Defendant [11 USC Section 502(d)] (cont'd from 9-8-16 per order approving stip to cont entered 8-29-16)

Docket 1

***** VACATED *** REASON: CONTINUED TO 1-12-17 AT 2:00 P.M.
PER ORDER GRANTING SECOND STIPULATION BETWEEN
PLAINTIFF AND DEFENDANT TO CONTINUE STATUS
CONFERENCE AND HEARING ON DEFENDANT'S AMENDED
MOTION FOR SUMMARY JUDGEMENT ENTERED 10-26-16**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Anna's Linens, Inc.

Represented By
David B Golubchik
Lindsey L Smith
Eve H Karasik
John-Patrick M Fritz
Todd M Arnold
Ian Landsberg
Juliet Y Oh

Defendant(s):

BALTIC LINEN COMPANY, INC.

Pro Se

Plaintiff(s):

Anna's Linens, Inc.

Represented By
Irving M Gross

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CONT... **Anna's Linens, Inc.**

Chapter 11

U.S. Trustee(s):

United States Trustee (SA)

Pro Se

**United States Bankruptcy Court
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2:00 PM

8:15-13008 Anna's Linens, Inc.

Chapter 11

Adv#: 8:15-01439 Anna's Linens, Inc. v. BALTIC LINEN COMPANY, INC.

#17.00 Motion for Summary Judgment, Or, In The Alternative, Summary Adjudication Of The Issues
(cont'd from 9-8-16 per order approving stip. to cont. hrg on mtn entered 8-29-16)

Docket 11

***** VACATED *** REASON: CONTINUED TO 1-12-17 AT 2:00 P.M.
PER ORDER GRANTING SECOND STIPULATION BETWEEN
PLAINTIFF AND DEFENDANT TO CONTINUE STATUS
CONFERENCE AND HEARING ON DEFENDANT'S AMENDED
MOTION FOR SUMMARY JUDGEMENT ENTERED 10-26-16**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Anna's Linens, Inc.

Represented By
David B Golubchik
Lindsey L Smith
Eve H Karasik
John-Patrick M Fritz
Todd M Arnold
Ian Landsberg
Juliet Y Oh
Jeffrey S Kwong

Defendant(s):

BALTIC LINEN COMPANY, INC.

Represented By
Michael S Kogan

Plaintiff(s):

Anna's Linens, Inc.

Represented By
Irving M Gross

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Anna's Linens, Inc.

John-Patrick M Fritz

Chapter 11

U.S. Trustee(s):

United States Trustee (SA)

Pro Se